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No. 03-1027

In The
Supreme Court of the United States

DONALD H. RUMSFELD, Secretary of Defense,

Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
as next Friend of Jose Padilla

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICI CURIAE LEGAL AND RELIGIOUS ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Amici curiae are legal and religious organizations committed to preservation of the rule of law and constitutionally protected freedoms. *Amici* address the central question presented in this case, namely whether the President may seize an American citizen in the United States and detain him indefinitely as an "enemy combatant."[2]

The Beverly Hills Bar Association has 3,300 members. For more than seventy years the Association has dedicated itself to the advancement of the rule of law, civil rights, equal access to the courts, and judicial independence. The Association seeks to appear as an *amicus* because this case presents crucial issues regarding each of the Association's historical concerns: Whether any branch of our federal government is unaccountable and above the rule of law? Whether civil rights and liberties belong only to those selected by executive fiat? And whether access to the courts and judicial review of executive actions can be unilaterally curtailed because of an undeclared "war on terrorism"?

The National Council of the Churches of Christ in the USA, founded in 1950, is the leading force for ecumenical cooperation in the United States. The NCC's 36 Protestant, Anglican and Orthodox denominations include more than 50 million persons in 140,000 local congregations in communities across the nation. The NCC is interested from a moral standpoint in the constitutional guarantees to due process afforded US citizens, which are at stake in this case.

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[1] Letters of consent to the filing of this brief have been lodged with the Court. No counsel for a party in this case has authored this brief in whole or in part and no person other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* do not address the other question presented, "Whether the district court has jurisdiction over the proper respondent to the amended habeas petition."

The Shalom Center is a nationwide transdenominational network of Jews and others who draw deeply on Jewish tradition to seek peace, pursue justice, heal the earth and build community. Among its concerns is the traditional Jewish teaching that all human societies, the "children of Noah," are bound by Divine command to make courts of law available to everyone.

The Southern Poverty Law Center, founded in 1971, is a nationally recognized leader in the area of civil rights litigation. The Center has litigated numerous pioneering civil rights cases on behalf of women, minorities, prisoners challenging their conditions of confinement, and many other victims of injustice. The Center has won six landmark civil rights lawsuits before this Court.

The Union for Reform Judaism (URJ), the congregational arm of the Reform Jewish Movement, encompasses 1.5 million Reform Jews in 900 congregations nationwide. The American Jewish community long has cherished the freedoms guaranteed by the Constitution. As we strive in this age of terrorism to determine the appropriate balance between our constitutionally protected freedoms and national security, we turn to Jewish values for guidance, which affirm the spark of the divine in every individual and mandate the just treatment of all. Guided by the highest ideals of the American legal system and inspired by our religious heritage, the URJ opposes indefinite detentions without charges or evidence, and administrative rulings that deny citizens the full scope of constitutionally-guaranteed due process rights.

ARGUMENT

Our national history has been marked by recurrent crises in which civil liberty is violated for the sake of perceived national security, only to be followed by restoration of liberty and repentance for the violations. We are now in such a crisis. Whether, this time, we will preserve liberty is largely in the hands of this Court.

Our historical pattern – overreaction, followed by restoration and repentance – has been detailed by the

Chief Justice,[3] and is summarized in the *amicus* brief of Fred Korematsu in the Guantanamo and *Hamdi* cases now before this Court.[4] The pattern began with the Alien and Sedition Acts of 1798 and continued through the Civil War, World Wars I and II and the Cold War. There is no need to repeat its full contours here.

Instead we focus on three episodes involving military detentions in wartime. In each the courts participated in the repression, the repentance, or both.

The first is a precedent worthy of emulation: this Court's correction of wartime military excess in *Ex Parte Milligan*, 4 Wall (71 U.S.) 2 (1866). All members of this Court – the majority on constitutional grounds and the dissent on statutory grounds – rejected the military detention and trial of Lamdin Milligan, even though he was formally accused of offenses comparable to those of which Jose Padilla is informally accused.

Not only did the Court unanimously reject Milligan's military trial, it also unanimously rejected the government's fallback claim – which has now become its principal claim in *Padilla* – of authority to detain him indefinitely, until the war is over.

Understandably the government's brief all but ignores *Milligan*. Instead it relies heavily on a second episode: this Court's upholding of a wartime military trial in *Ex Parte Quirin*, 317 U.S. 1 (1942). But *Quirin* did not address the issue presented here – the executive claim of military authority to hold an American citizen indefinitely without trial. It considered only the separate issue of detention for trial by military commission, an issue not presented here.

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[3] William H. Rehnquist, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998) (hereafter "Rehnquist") (page citations herein from First Vintage Books ed. 2000).

[4] Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, filed in *Odah v. US*, *Rasul v. Bush*, and *Hamdi v. Rumsfeld*, Nos. 03-343, 03-334 and 03-6696 this term.

Moreover, the *Quirin* facts, unlike *Milligan* and *Padilla*, involved "combatants" subject to detention for the duration of the war.

Quirin should not now be extended beyond its facts and the narrow question it decided. As Justice Frankfurter later regretted, it was "not a happy precedent."[5] Under pressure of war and potential presidential defiance, the Court ruled precipitously, without being fully advised. By the time the Court issued its opinion, six petitioners were already executed. It was too late for second thoughts.

The pressures of the times, the tendency of the executive to withhold material information, and this Court's vulnerability to both, were further exemplified by the third episode: convictions of Japanese Americans for violating military curfew and internment orders, upheld in *Hirabayashi v. U.S.*, 320 U.S. 81 (1943) and *Korematsu v. US*, 323 U.S. 214 (1944), but later regretted and vacated.

Like *Quirin*, *Hirabayashi* and *Korematsu* illustrate the temptation for the executive to exaggerate the military necessity of wartime restrictions on liberty. They stand as monuments to the imprudence of entrusting liberty in time of crisis to the executive and military.

Taken together, all three episodes teach that to preserve liberty, any departures from ordinary constitutional safeguards require both judicial scrutiny and congressional mandates. Yet the government now asks the Court to permit indefinite military detention of an American citizen seized off the battlefield, with minimal judicial review and no congressional authorization.

That is reason enough to reject its request. But there is more. Whereas in *Milligan* Congress imposed limits on

[5] "Memorandum Re: Rosenberg v. United States, Nos. 111 and 687, October Term 1952," June 4, 1953, at 8; Frankfurter Papers, Part I, Reel 70, quoted in Louis Fisher, *CRS Report for Congress, Military Tribunals: The Quirin Precedent*, March 26, 2002, (hereafter "Fisher") at CRS-39 and n. 188.

detentions of citizens, it now broadly prohibits them: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). As the court below correctly ruled,[6] this prohibits the military detention of Mr. Padilla, and nothing in the congressional authorization of the use of force purports to allow an exception.

The lessons of history, then, confirm the wisdom of the ruling below that the President has no inherent constitutional authority to detain Jose Padilla indefinitely in military custody.

I. *Ex Parte Milligan*: The Most Applicable Precedent

Decided in 1866, *Ex Parte Milligan*, 4 Wall (71 U.S.) 2, was a judicial correction of wartime military excess. While one may question some of its rhetoric as well as the majority's decision to reach constitutional issues,[7] the core of the judgment stands as one of the "bulwarks of American liberty."[8] All nine Justices – both the majority and the dissent – ruled that the military had no jurisdiction to detain or prosecute a civilian citizen of Indiana for attempting to aid the enemy in the Civil War, and ordered his release from military custody. *Id.* at 106.

The parallels between the cases of Lamdin Milligan and Jose Padilla are striking. Like Padilla, Milligan was accused of being what the government today might (erroneously) call an "unlawful enemy combatant." Then, as now, the government invoked the President's authority as Commander in Chief in an unsuccessful effort to bypass constitutionally ordained judicial procedures and to avoid

[6] *Padilla v. Rumsfeld*, 352 F.3d 695, 718-24 (2d Circ. 2003), *cert. granted sub nom. Rumsfeld v. Padilla*, 2004 U.S. LEXIS 1011 (U.S., Feb. 20, 2004).

[7] See Rehnquist at 134-37, 221.

[8] Charles Warren, THE SUPREME COURT IN UNITED STATES HISTORY, 2d ed., vol. 2, Boston: Little Brown, at 427-28, quoted in Rehnquist at 132.

an express congressional prohibition. Then, as now, the government cited the dangers posed by secretive enemies, as well as the laws of war and supposed lack of judicial competence, to justify military detention and trial of a civilian accused of serious crimes.

While the majority relied on constitutional and the dissent on statutory grounds, none recognized any inherent executive authority, certainly not in the face of an express congressional prohibition, for the military to prosecute or detain indefinitely an American citizen where civil courts are open and unobstructed.

A. The Charges In *Milligan*: Comparable to *Padilla*

Milligan was formally accused of offenses that were serious in both a criminal and a military sense – comparable in nature and gravity to those of which Jose Padilla is informally accused.[9] At a time when the Civil War raged, Milligan allegedly joined a secret society known as the Order of American Knights, or Sons of Liberty. *Id.* at 6. This was allegedly "a powerful secret association, composed of citizens and others, [which] existed within the state, under military organization . . ." *Id.* at 140. They were accused of "conspiring against the draft, and plotting insurrection, the liberation of prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government," *id.*, and of "holding communication with the enemy." *Id.* at 6. At the time, argued the government, the Sons of Liberty claimed 100,000 members in Indiana and neighboring states,[10] jeopardizing the security

[9] One may question the evidentiary foundation for these charges. Rehnquist at 104. However, neither the majority nor the dissenters did so; rather, taking them as true, all nine Justices nonetheless concurred in ordering Milligan's discharge from military custody.

[10] Various claims as to the numerical strength were made in testimony at the military trial. Rehnquist at 90-91, 97.

of confinement of ten thousand rebel prisoners of war in the vicinity. *Id.* at 87, 102.

Milligan was arrested in Indiana in October 1864 by order of the military commandant. At the time, Indiana enjoyed peace but not tranquility. It was then a "theatre of military operations, had been actually invaded, and was constantly threatened with invasion." *Id.* at 140.

Milligan was confined for 16 days and then tried before a military commission, which found him guilty of conspiracy against the government, affording aid and comfort to rebels, inciting insurrection, disloyal practices, and violations of the laws of war. The commission sentenced him to death. *Id.* at 7. Before his case came before this Court, President Johnson commuted his sentence to life in prison.[11]

Unlike Milligan, Padilla allegedly traveled abroad for training and collaboration with terrorists. This, however, makes no difference. Milligan, too, allegedly joined a secret organization in communication and cooperation with armed adversaries, plotting violent action against the United States. Nothing in the government's argument suggests that it would view Padilla any differently, if his communications with the enemy had been by long distance, like Milligan's, rather than by traveling to Afghanistan.

B. The Military Commission's Lack of Jurisdiction

1. The Government's Arguments: Parallels With *Padilla*

Milligan's habeas petition asked for release from military custody on the ground that the military had no jurisdiction to try him. Because civil courts in Indiana were open and functioning, he argued, his military trial violated the Constitution and exceeded executive authority, at least

[11] Rehnquist at 104.

in the absence of congressional authorization. *Id.* at 22, 28-40, 42-84.[12]

The government contended that in authorizing military detention and trial of disloyal citizens, President Lincoln acted within his powers as Commander in Chief. In September 1862 Lincoln had suspended habeas corpus, and authorized military detention and trial of persons "guilty of any disloyal practice, affording aid and comfort to rebels, . . ." *Id.* at 15-16. Without conceding that congressional legislation was "needed" to sustain this proclamation, the government argued that the subsequent statute of March 1863, authorizing suspension of habeas corpus, ratified Lincoln's proclamation. *Id.* at 16.

Then, as now, the government argued that the power to detain and try citizens who collaborate with adversaries is inherent in the constitutional powers of the Commander in Chief:

> The commander-in-chief has full power to make an effectual use of his forces. He must, therefore, have power to arrest and punish one who arms men to join the enemy in the field against him; one who holds correspondence with that enemy; one who is an officer of an armed force organized to oppose him; one who is preparing to seize arsenals and release prisoners of war. . . . *Id.* at 17.

Then, as now, the government argued that these inherent powers were not confined to the battlefield, especially in view of the special nature of the war. When Milligan argued that he had not been a resident of a rebel state, the government replied that "neither residence nor propinquity to the field of actual hostilities" is the test of military jurisdiction, "even in a time of foreign war, and certainly not in a time of civil insurrection." *Id.*

[12] The parties also debated whether the federal courts had jurisdiction. This Court ruled that they did. 71 U.S. at 117-18. This issue is not presented in *Padilla* and is not addressed here.

The government also contended that Indiana was at the time of Milligan's arrest a "theatre of military operations." Not only was it a "geographical military department, duly established by the commander-in-chief," it "had been and was then threatened with invasion, . . ." *Id.* at 17.

The government further argued that civil courts could not intervene. Once war begins, it argued, the Commander in Chief "is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration." *Id.* at 18. Civil courts were not competent to deal with the threat, in part because the Sons of Liberty – like Al Qaeda today – was a secret organization. Courts could not know how extensive it was, because

> It was a secret order. . . . But the Executive . . . did know, that this Order professed to have one hundred thousand men . . . , so that no jury could be found . . . , and that any courthouse . . . , would have been destroyed. The President has judged that in this exigency only a military tribunal could safely act. *Id.* at 102.

Thus, in *Milligan* as in *Padilla*, the government argued (1) that the Commander in Chief's power to conduct war necessarily implies the power to detain and punish citizens for alleged collaboration with the enemy, (2) that this power extends even outside the "field of actual hostilities," (3) that even a State with no actual hostilities was within the "theatre of military operations," (4) that this was due in part to the special nature of the conflict (civil insurrection then, international terrorism now), (5) that the President alone could judge military necessity, (6) that civil courts were not competent to act, in part because of the secretive character of the enemy, and (7) that the military therefore had jurisdiction over a citizen accused of collaborating with the enemy.

Even in the context of one of the greatest threats our republic has ever faced, this Court rejected these arguments. It should no more accept them now.

2. The Majority: The Constitution shields citizens from military jurisdiction

No member of this Court accepted the assertion of presidential authority as Commander in Chief to subject Milligan to military jurisdiction. On the contrary, both the majority (on constitutional grounds) and dissent (on statutory grounds) rejected military jurisdiction.

The majority rightly viewed the issue as one of epic proportion:

> No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. . . . By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. 71 U.S. at 118-19.

The risk to civil liberty in troubled times had been anticipated by the framers, who:

> . . . foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. *Id.* at 120.

So they wrote a law to cover all cases: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Id.* at 120-21.

The Constitution conferred the judicial power on the judiciary, not the military. The "laws and usages of war" could not take that power away, because "they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." *Id.* at 121.

In addition, the constitutional right of trial by jury was violated by a military trial. *Id.* at 122-23. It could not be that "when war exists, foreign or domestic, . . . a commander . . . can, if he chooses, . . . on the plea of necessity, . . . substitute military force for and to the exclusion of the laws, . . ." *Id.* at 124.

If that were true, "there is an end of liberty regulated by law. Martial law, . . . on such a basis, destroys every guarantee of the Constitution, . . . Civil liberty and that kind of martial law cannot endure together; . . ." *Id.*

Indiana was not a "theatre of military operations." If "once invaded, the invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration." *Id.* at 126-27.

Secret conspiracies like those with which Milligan (and now Padilla) was allegedly involved – "armed to oppose the laws, and [which seek] by stealthy means to introduce the enemies of the country into peaceful communities" – were indeed "extremely perilous." But the constitutional answer is not military trial. It is instead for civil courts to impose "the heaviest penalties of the law, . . ." *Id.* at 130.

If Indiana in 1864 did not meet the constitutional test – permitting military jurisdiction over civilians only where civil courts are closed and cannot function – neither does South Carolina, where Padilla has been in military detention for nearly two years.

3. The Dissent: Only Congress can authorize military jurisdiction over citizens

The four dissenters likewise lent no support to the claim of inherent executive power to subject an American citizen to military jurisdiction. And they expressly rejected military jurisdiction beyond the limits set by Congress.

Concurring that habeas should be granted and Milligan discharged from military custody, the dissenters

"assent[ed] fully" to the majority view "of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty." *Id.* at 132-37.

They dissented on only two points. First, congressional suspension of habeas "authorized" the executive to arrest and detain – within limits. Second, once Congress suspends habeas, Congress may authorize military arrest, detention and trial of citizen collaborators, even "in states where civil courts are open." *Id.* at 137.

Neither point supports the government's claims in *Padilla*. Both apply only when Congress authorizes suspension of habeas, which it has not done here.

The dissent was equally unhelpful to the government in *Milligan*. In authorizing suspension of habeas, Congress had imposed limitations. *Id.* at 133. Except for prisoners of war,[13] it required the executive to inform federal courts of all Union state citizens held prisoner under presidential authority and to release them if the grand jury adjourned without proceeding against them. *Id.* at 133-34. Since the grand jury adjourned without indicting Milligan, *id.* at 131, his continued military detention violated the statute. *Id.* at 134.

C. The Military Could Not Detain Milligan Indefinitely

The government had a fallback argument in *Milligan*, which has now become its lead argument in *Padilla*: Even if the military tribunal had no jurisdiction, Milligan could nonetheless be "held, under the authority of the United States, until the war terminates, . . ." *Id.* at 21.

Neither the majority nor the dissent accepted this claim. The majority answered:

[13] The Court rejected the government's contention that Milligan was a prisoner of war. 71 U.S. at 21, 131. The government does not contend that Padilla is a prisoner of war.

> If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. *Id.* at 131.

The government likewise alleges that Padilla's actions were not "legal acts of hostility" or protected by the "rights of war." Hence *Milligan* equally negates the government's claim to detain Padilla indefinitely.

The claim fails as well under the rationale of the *Milligan* dissent. Whereas in *Milligan* Congress merely limited military detentions, it now broadly prohibits them: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. 4001(a). This bars the military from arresting a citizen off the battlefield and detaining him in the United States where civil courts are functioning.[14] The Congressional authorization for use of force following 9/11 said nothing about detaining citizens,[15] and *Milligan* contradicts any claim that the power to detain citizens off the battlefield is inherent in the Commander in Chief's use of force.

The *Milligan* dissent, then, teaches that the military has only such power to detain citizens off the battlefield as Congress chooses to authorize. Here Congress has not only failed to authorize, but affirmatively prohibited such detentions.

D. The Message of *Milligan*

The government claims that the military may detain Jose Padilla indefinitely, until the "war" on terrorism is

[14] See analysis by the Court of Appeals in this case, 352 F.3d at 718-22.

[15] *Id.* at 722-24.

over. In rejecting the same claim in *Milligan*, this Court answered:

> If it was dangerous, . . . , to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to the rebels, and incited the people to insurrection," the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury . . . and if indicted, try him according to . . . the common law. 71 U.S. at 122.

"If this had been done," concluded the Court, "the Constitution would have been vindicated, the law . . . enforced, and . . . personal liberty preserved . . ." *Id.* So too here. Jose Padilla should be discharged from military custody and, if dangerous, returned to civil courts.

II. *Ex Parte Quirin:* "Not A Happy Precedent"

The government's brief all but ignores *Milligan*. Instead it relies heavily on *Ex Parte Quirin*, 317 U.S. 1 (1942), where the Court upheld President Roosevelt's authority to try by military commission eight German saboteurs, including one arguable American citizen. In the government's view, "*Quirin* settles that the Constitution raises no absolute prohibition against the detention of an American citizen as an enemy combatant in the circumstances of this case." Pet. Br. 34.

But *Quirin* did not address the issue presented here (and in *Milligan*) – the executive claim of military authority to hold an American citizen indefinitely without trial. The *Quirin* Court made clear, "The question for decision is whether the detention . . . for trial by Military Commission" was lawful and constitutional. 317 U.S. at 18-19.

Even on the issue it did decide – the "jurisdiction of military tribunals" – *Quirin* expressly limited its holding to the facts of that case. *Id.* at 45-46.

Unlike *Milligan* – a judicial correction of wartime military excess – *Quirin* was part of a wartime excess. The Court ruled precipitously, under pressure of the most

difficult year of the war and a presidential threat to defy a contrary ruling. It heard argument the day briefs were filed and announced its decision one day after argument. It did not issue an opinion until three months later – after six defendants were already executed.

This placing of the decisional cart before the jurisprudential horse was later regretted by Justice Frankfurter as "not a happy precedent."[16] Justice Douglas lamented the practice as "extremely undesirable . . . Because once the search for the grounds, the examination of the grounds that had been advanced is made, sometimes those grounds crumble."[17]

Quirin thus illustrates *Milligan's* admonition that constitutional liberty is most at risk when "society is disturbed by civil commotion – if the passions of men are aroused and the restraints of law weakened . . . " 71 U.S. at 123-24. While there is no occasion to revisit *Quirin* here, because it dealt with a separate issue (detention for trial by military commission), it should not now be extended beyond its facts and the narrow legal issue it decided.

A. A Materially Different Question

The issue in *Padilla* is the same as the second issue in *Milligan*: namely, whether the military is authorized to detain an American citizen indefinitely, until the war is over. *Quirin*, in contrast, revisited the first issue in *Milligan*: whether the military may detain a citizen for trial and then try him. *Padilla* is thus governed by *Milligan*, not *Quirin*.

Quirin made clear what it decided. With respect to detention, the July 31, 1942 per curiam order held "[t]hat petitioners are held in lawful custody for trial before the

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[16] Note 5 *supra*.

[17] Conversation between Justice William O. Douglas and Professor Walter F. Murphy, June 6, 1962, at 204-05, Seeley G. Mudd Transcript Library, Princeton University, quoted in Fisher at CRS-39 and n. 189.

military commission, . . ." 317 U.S. at 48. Three months later the Court's opinion, issued October 29, 1942, reiterated, "The question for decision is whether the detention of petitioners . . . for trial by Military Commission" was lawful and constitutional. *Id.* at 18-19.

The Court's answer was even narrower. It had "no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals. . . ." It was "enough that petitioners here, upon the conceded facts, were plainly within those boundaries, . . ." In particular, they

> were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in our territory without uniform – an offense against the law of war.

The Court then expressly limited its holding to those facts: "We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission." *Id.* at 45-46.

Padilla does not fit within the *Quirin* holding. The military detention of Padilla has two purposes: to prevent him "from rejoining the enemy and continuing the fight," and "to gather critical intelligence." Pet. Br. 28-29. The government does not claim to hold him, as in *Quirin*, "in good faith for trial by military commission."

The distinction is both constitutionally and practically significant. It matters constitutionally because the precedent on indefinite detention without trial is *Milligan*, not *Quirin*. *Milligan* rightly rejected the claim that the military could hold a citizen collaborator without trial "until the war terminates."

The distinction matters practically as well. Indefinite detention until the "war" on terrorism ends, without trial, could mean imprisonment for years, even for life. Whatever the shortcomings of a military trial – and in *Quirin* they were many – the accused has at least some opportunity to be heard in an adversarial setting. In contrast,

under the government theory rejected in *Milligan* and renewed here, Padilla would have no such right.[18]

B. Materially Different Facts

The alleged factual situation of Padilla, says the government, "fits squarely within" the Court's language in *Quirin*. Pet. Br. at 31.

The government overlooks material differences. First, the facts in *Quirin* were largely stipulated and, except as otherwise noted, "undisputed." 317 U.S. at 20. The only charge the Court ruled triable by military commission was predicated on "admitted facts." *Id.* at 36. The Court's holding rested upon "conceded facts." *Id.* at 46.

This matters, because the facts in *Quirin* were jurisdictional: on those facts, and "only" on those facts (*id.*), the Court found military trial permissible. In contrast, Padilla has stipulated to nothing. Nor could he do so, because he has had no opportunity to be heard. Yet the government claims the right to detain him indefinitely, while denying him any right to challenge the "facts" on which its claim of right is based.

Second, even the government's version of the *Padilla* facts differs materially from those in *Quirin*. Unlike Padilla, the *Quirin* prisoners fit the traditional concept of combatants in the law of war. All were born in Germany. Six had remained citizens of that enemy nation with which the United States was in a declared war. A seventh forfeited his U.S. citizenship by joining the German army.[19] The citizenship of the eighth was in dispute before this Court. All were paid agents of the German military. They were transported to the United States by German military submarines, discarded their German military uniforms

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[18] Recently the government permitted Padilla to meet with counsel, but only as a matter of policy, not of right. Pet. Br. 12 n.5.

[19] Fisher at 19, 24.

only after landing on our beaches, and entered our country carrying explosives. *Id.* at 21-22. They came to our country, not to commit crimes, but instead with instructions from a German military officer "to destroy war industries and war facilities in the United States" and "with the purpose of destroying war materials and utilities." *Id.* at 21, 46.

These facts mattered to the narrow holding in *Quirin*. They took the case out of the category of crimes for which the right of trial by jury is protected by the Constitution. The purpose of the constitutional right was "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future." *Id.* at 39. But the undisputed *Quirin* facts fit clearly within traditional understandings of "offenses against the law of war not triable by jury at common law." *Id.* at 40. Hence they could be tried by military commission. *Id.* at 42, 45.

The *Padilla* facts differ. There is no claim that he acted on behalf of any foreign government or in any "war" that would have been defined as such at the time of the Constitution. There is no claim that he came to the United States by military transport, wore a military uniform en route, carried military arms or explosives into this country, or had the purpose to attack military targets.

Rather, the government's claim is in essence that he came here on behalf of a terrorist organization to look for potential sites for terrorist bombings. He was not looking for specifically military targets. On the contrary, he is alleged to have associated with Al Qaeda, a group known to attack civilians.

If the government's allegations are true, then, Padilla committed crimes of a nature traditionally prosecuted in civil courts, e.g., *U.S. v. Timothy McVeigh*, 153 F.3d 1166 (10th Cir. 1998), *cert. denied*, 526 U.S. 1007 (1999); *U.S. v. Yousef*, 327 F.3d 56 (2d Cir.), *cert. denied sub nom. Yousef v. U.S.*, 124 S.Ct. 353 (2003), and for which the Constitution accordingly guarantees the right of trial by jury and to due process of law. Under the rationale of *Quirin*,

Padilla should be tried in civil court, not detained indefinitely by the military.

C. Padilla Is Not A "Combatant" Under *Quirin*

The government relies on *Quirin* to distinguish lawful and unlawful combatants, as follows:

> The law of war draws a distinction . . . between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. 317 U.S. at 31-32 (footnotes omitted).

But there is also a distinction between combatants – whether lawful or unlawful – and criminals. Unlike the defendants in *Quirin* – but like Milligan – Padilla was never a "combatant" in the first place.

Under the law of war a combatant is privileged to engage in combat, without being prosecuted for doing so, so long as he does not commit a war crime, such as murdering a civilian or, as in *Quirin*, going behind enemy lines without uniform as a saboteur. As stated in the 1977 Geneva Protocol I, combatants are persons who "have the right to participate directly in hostilities."[20] They cannot be prosecuted for mere membership in an army, nor merely for engaging in armed hostilities against an opposing force. They can be prosecuted only for particular *acts*

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[20] Protocol I defines "combatants" as members of the armed forces of a party to a conflict, who "are combatants, that is to say, they have the right to participate directly in hostilities." *Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, entered into force, Dec. 7, 1979, art. 43.2. Art. 44.1 specifies that "combatant" is "defined in Article 43."

which amount to war crimes. Committing such acts makes one an "unlawful combatant."

Padilla was not an "unlawful" combatant because he was not a combatant. His legal position contrasts with that of the *Quirin* defendants:

Quirin Defendants. Until they arrived in the United States, the *Quirin* defendants committed no legal wrong under the laws of war.[21] They were entitled to join the German military, and even to train to attack military installations in this country. Upon reaching our shores, even if they had actually blown up a munitions factory, they still would have been protected from prosecution, so long as they remained in uniform. Authorities on international law, noted the Court in *Quirin*, were "unanimous in stating that a soldier in uniform who commits the acts mentioned [destroying bridges, war materials, communication facilities, etc.; carrying messages secretly; or other hostile acts] would be entitled to treatment as a prisoner of war." 317 U.S. at 35 n. 12. As the Court stressed, it was only "the absence of uniform that renders the offender liable to trial for violation of the laws of war." *Id.* at 35 n. 12 and 38.

Padilla. Padilla's case is materially different. None of his alleged acts were privileged under the law of war. If he had joined Al Qaeda,[22] he would not thereby have exercised any right under the law of war, but would instead have joined a joint criminal enterprise.[23] If he had set off a

[21] If any of them was a citizen, a question the Court declined to decide, he might have been prosecuted for treason, a crime under domestic law which by definition could not be charged against non-citizens. See 317 U.S at 20, 38.

[22] The government alleges only that he was "closely associated" with it. Pet. Br. 4.

[23] For example, under The International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, 37 I.L.M. 249 (1998) (hereafter "Terrorist Bombing Convention"), a person is guilty of a terrorist bombing if he contributes to the commission of the offense "by

(Continued on following page)

"dirty bomb" in the United States,[24] that, too, would not have been privileged, but a crime of international terrorism.[25] Wearing an Al Qaeda "uniform" would not shield him from prosecution. From beginning to end, he would have been a criminal, not a combatant.

Thus the factual distinctions between *Padilla* and *Quirin* matter. If the allegations against Padilla are true, he is subject to the criminal law. But he is also entitled to all the procedural safeguards guaranteed by the Constitution to any person detained for alleged crimes.

D. *Quirin's* Purported Distinction of *Milligan* Does Not Affect *Padilla*

Quirin construed *Milligan*'s injunction – against military jurisdiction over citizens where civil courts are open and unobstructed – as limited to its facts, namely "that Milligan, not being part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as . . . martial law might constitutionally be established." Hence *Milligan* was "inapplicable" to *Quirin*. *Id.* at 45-46.

This interpretation, that Milligan was not "associated" with the armed forces of the enemy, overlooked certain facts. While he never traveled to rebel states, this Court

a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offense . . ." Art. 2.3(a) and (c).

[24] The government alleges only that he was planning to do so. Pet. Br. 5.

[25] Terrorist Bombing Convention, Art. 2.1.

The Convention does not govern the "activities of armed forces undertaken by military forces of a State in the exercise of their official duties, . . ." Art. 19.2.

Although its codification in treaty form is recent, international practice has long treated terrorist bombings as crimes.

decided his case on the factual premise that he joined a secret organization "holding communication with the enemy" and plotting "armed cooperation with the enemy." The government told this Court that he was "one who holds correspondence with that enemy." USL at 5, 27. Surely constitutional rights to trial by civil court do not turn on whether citizens who collaborate with the enemy choose to do so in person or by mail. If Milligan was not subject to the law of war, then neither is Padilla.[26]

E. A Flawed Proceeding

When Justice Frankfurter later called *Quirin* "not a happy precedent," he was referring to the announcement of judgment before the opinion was written.[27] But this was as much a symptom of broader problems as it was a contributing factor to a dubious judgment.

Both the military proceedings and this Court rushed to judgment. The saboteurs landed on June 12 and 16, 1942. One turned himself in on June 14, and the others were arrested by June 27. On July 2 the President established a military commission. The trial began July 8 and concluded August 1. The commission imposed death sentences August 3. One day later, the President ordered the execution of six of the eight (sparing two who cooperated). On August 8 the six were executed.[28]

Meanwhile, military defense counsel first approached this Court on July 23. Oral argument began on July 29, the same day briefs were filed, and concluded July 30.[29] The Court issued its per curiam decision the next day. Its opinion did not come until three months later – after the six defendants were executed.

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[26] The government does not claim that Padilla was a member of Al Qaeda, but rather that he was "closely associated" with it. Pet.Br. 4.

[27] Fisher at CRS-39 and n. 188.

[28] Fisher at CRS-2-3, 5, 8, 14-15.

[29] *Id.* at CRS-12, 16.

The Court was not fully advised. Attorney General Biddle, who also served as prosecutor before the military commission, told the Court that establishing a military commission responded to the President's "clear duty . . . to provide a speedy, certain and adequate answer, long prescribed by the law of war, to this attack . . ."[30]

Originally, however, the government planned to prosecute the saboteurs in civil court. According to then still secret testimony in the military trial, the FBI told defendant Dasch that he would be indicted and tried in federal court. He agreed to plead guilty "with the understanding that everything would be kept quiet." But after seeing his photo in the newspaper and believing himself betrayed, he withdrew his offer to plead. "He now wanted to go into court and make a full explanation, . . ."[31]

According to Fisher:

> This turn of events helped convince the Administration to choose a secret military trial and prohibit any appeal to civil courts. . . . FBI Director J. Edgar Hoover, having received great credit for discovering the saboteurs, did not want it known that one of them had turned himself in and helped apprehend the others.[32]

To be sure, avoiding embarrassment to the FBI was not the only reason for a secret military trial. The government also hoped to discourage future German U-boat attempts.[33] But FBI embarrassment was a factor.

The secrecy of the military trial kept this information not only from the public, but apparently from this Court as well. The opinion makes no mention of the voluntary surrender, plea agreement or withdrawal. It states only,

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[30] *Id.* at CRS-18 and n. 81.

[31] *Id.* at CRS-3.

[32] *Id.* at CRS-3.

[33] *Id.* at CRS 3-4.

"All were taken into custody . . . by agents of the Federal Bureau of Investigation." 317 U.S. at 21.

The secrecy also kept this Court in the dark on issues of procedural fairness. Two military defense counsel were appointed to represent seven defendants.[34] One objected to the commission that it was difficult to represent all seven, each with differing circumstances, so that "what is said in favor of one may not be favorable to another or may be positively unfavorable." He should not be put in the position of "arraying one of our clients against the other," even though the two arguable U.S. citizens did seem to demand "separate and different consideration."[35] Yet no additional counsel were detailed for the defense.

There were also questions about this Court's independence and impartiality. An *ex parte* communication may have interfered with its independence. As Attorney General Biddle recalled in his memoirs, FDR was determined not to turn over the saboteurs to the courts. "I won't hand them over to any United States marshal armed with a writ of habeas corpus," FDR told Biddle. "Understand?"[36] As explained by one scholar:

> The Attorney General apparently communicated this information to Justice Roberts, for when the Court discussed the case in Conference, Roberts told his colleagues that Biddle feared FDR would execute the saboteurs, regardless of what the Court did. "That would be a dreadful thing," Stone exclaimed.[37]

The impartiality of some Justices was also in question. According to Secretary of War Stimson, one month

[34] *Id.* at CRS-6.

[35] *Id.* at CRS-13.

[36] Francis Biddle, IN BRIEF AUTHORITY 331 (1962).

[37] Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL.W.L.REV. 433, 476 (2002) (footnotes omitted).

before argument, Justice Frankfurter advised him to try the saboteurs by a military commission composed only of soldiers.[38] Justice Byrnes had worked closely with the President and chief prosecutor Biddle on the war effort for months. After the decision, but before the opinion, he resigned to join the Administration.[39]

Perhaps the greatest cloud over *Quirin*, as Justices Frankfurter and Douglas later lamented, was cast by issuing the decision before the opinion. This closed the door on second thoughts. For example, there was a serious question whether the procedures prescribed by law for courts-martial applied to the military commission. Contrary to those procedures, no commission member was a lawyer,[40] and the record was not reviewed by the Judge Advocate General. The opinion reported the Court's "unanimous" view that the procedures did not apply. But it acknowledged that "a majority of the full Court are not agreed on the appropriate grounds for decision" on the issue. 317 U.S. at 47.

Justice Frankfurter evidently had doubts. He consulted military law expert Frederick Bernays Wiener. Shortly after the Court issued its opinion, Wiener advised that FDR's order was "palpably illegal" and that it seemed "too plain for argument" that the record should have been reviewed by a Judge Advocate General before going to the President.[41]

But by then, six defendants had been executed. It was too late for public misgivings.

[38] Stimson Diary, June 29, 1942, at 131, cited in Fisher, CRS-20 and n. 89.

[39] Fisher at CRS-20 and nn. 90-92.

[40] *Id.* at CRS-40.

[41] *Id.* at CRS-35-37.

F. Limited Precedential Value

Quirin decided a different issue on different facts, and expressly limited its narrow holding to that issue and those facts. Under pressure, the Court ruled in haste, without being fully advised. Its opinion did not issue until after six petitioners were already executed. While there is no occasion here to revisit *Quirin*, since it dealt with a separate issue, neither should it be extended beyond its particular facts or the issue it decided.

III. *Hirabayashi* and *Korematsu*: Exaggerating Claims of Military Necessity

The pressures of the times, the tendency of the government to withhold material information, and the Court's vulnerability to both, were further illustrated by the judgments in *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944). *Hirabayashi* upheld a World War II curfew imposed on Japanese American citizens. *Korematsu* upheld their exclusion from areas where they lived and their removal to internment camps.

Both the curfew and the internment were decreed by military order, and purportedly justified on grounds of "military necessity." But this claim has not stood the test of history.

A. The Military Orders

Contrary to the government's implication in *Padilla,*[42] the exclusion order was a military, not a civilian decision.

[42] Without mentioning the military orders or General DeWitt's decision, the government labors to characterize the wartime detention of Japanese Americans as "administered by civilian authority," conducted " 'by a civilian agency, . . . , *not by the military*' " (emphasis in original), and involving "civilian rather than military detentions . . ." Pet. Br. 46 n. 19 (citations omitted). These descriptions are, to say the least, incomplete.

It could not have been otherwise. At the time, "The Justice Department consistently took the view that civilian authorities could not authorize the exclusion of citizens and that the matter should be left to military judgment." *Hirabayashi v. United States*, 828 F.2d 591, 595 (9th Cir. 1987) (footnote omitted).

The decision to issue the curfew and exclusion orders was made by General DeWitt, the officer who issued them. As the Court of Appeals later found, "There has been no showing that General DeWitt even consulted with War Department officials before issuing the orders . . ." 828 F.2d at 599.

B. Misleading Claims of Military Necessity

The Brief for the United States in *Hirabayashi* "justified the exclusion and curfew orders upon what it said was a reasonable judgment of military necessity." *Id.* at 596. It argued, in essence, "that the urgency of the situation made individual hearings to determine loyalty impossible." *Id.*

This Court unanimously accepted the government argument, explaining that

> we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that [Japanese American] population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with . . . 320 U.S. at 99.

One year later, the Court's divided opinions in *Korematsu* again relied heavily "upon the position of the government that there was a perceived military necessity, . . ." 828 F.2d at 603, indeed a "military imperative." 323 U.S. at 219.

Concern about the military risk of possible individual collaborators among Japanese Americans was not frivolous. During 1942 the Japanese shelled targets in California, Oregon, Vancouver and Alaska.[43]

The question of military necessity before this Court in *Hirabayashi*, however, was narrower: whether, as the government argued, "the urgency of the situation made individual hearings to determine loyalty impossible." It was on this issue that the Court deferred to the military's judgment on military necessity.

This was not, in fact, the judgment of the officer who issued the orders. In his report, General DeWitt stated, "It was not that there was insufficient time in which to make a determination; . . ." But after receiving his report, the War Department deleted that sentence. It then added a new phrase: that "time was of the essence." After making other substantive changes, it published "his" report with a new date, and attempted to destroy all copies of the original. 828 F.2d at 597-98.

When the Justice Department lawyer who was the principal author of the government's brief asked for a copy of the original report, "the War Department gave him only a few selected pages." *Id.* at 599. A copy of the original report was discovered only decades later in the National Archives. *Id.* at 593, 598.

General DeWitt, as the government conceded years later, "acted on the basis of his own racist views and not on the basis of any military judgment that time was of the essence." *Id.* at 601.

The War Department's version of General DeWitt's report became public in time for the briefing of *Korematsu*. *Id.* at 602. Justice Department officials at the time were of the view that it contained "willful historical inaccuracies and intentional falsehoods." *Korematsu v. United States*, 584 F. Supp. 1406, 1418 (N.D. Cal. 1984). "The record is

[43] Rehnquist at 197-98.

replete with protestations of various Justice Department officials that the government had the obligation to advise the courts of the contrary facts and opinions." *Id.*

But the government did not do so. A draft government brief would have advised that the report's "recital of the circumstances justifying the evacuation as a matter of military necessity, . . . , is in several respects, . . . in conflict with information in the possession of the Department of Justice." *Id.* at 1417. The final brief deleted that sentence. *Id.* at 1418. Also omitted was information from the Federal Communications Commission, Department of the Navy and Justice Department "which directly contradicted General DeWitt's statements." *Id.* at 1419.

C. The Lesson of *Korematsu*

Congress in 1980 established a Commission on Wartime Relocation and Internment of Civilians. Pub. L. No. 96-317, section 2, 94 Stat. 964 (1980), "composed of former members of Congress, the Supreme Court and the Cabinet as well as distinguished private citizens." 584 F. Supp. at 1416. Their unanimous conclusion was that military necessity did not warrant exclusion and internment of Japanese Americans. Instead, the "broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership." As a result, "a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any other probative evidence against them, were excluded, removed and detained . . ." *Id.* at 1416-17, quoting the Commission's Report, *Personal Justice Denied* (1982) at 18.

The district court that later vacated Fred Korematsu's conviction concluded that this Court's ill-advised 1944 judgment "stands as a caution that in times of stress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." 584 F. Supp. at 1420.

CONCLUSION

Nearly two years have passed since the military took custody of Jose Padilla from a federal court in New York City. It detains him in South Carolina on a claim of military necessity, without due process of law, despite an express statutory prohibition of detention of a United States citizen without congressional authorization.

The history of the overstated claims of military necessity in *Milligan, Quirin, Hirabayashi* and *Korematsu*, and of the resulting violations of liberty and due process of law, confirms the wisdom of the judgment of the Court of Appeals in this case. In *Milligan*, this Court corrected wartime military excess; in *Quirin* it unwittingly participated in such excess. The applicable precedent – and the one consistent with this nation's cherished tradition of the rule of law – is *Milligan*, not *Quirin*. *Amici* urge this Court to affirm the ruling below that Jose Padilla be released from military custody and, if warranted, returned to the civil courts.

Respectfully submitted,

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